**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MRS. JUSTICE K. HEMA**

**THURSDAY, THE 12TH APRIL 2007 / 22ND CHAITHRA 1929**

**Crl. Rev. Pet. No. 968 of 1999**
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**ST.447/1997 of JUDL. MAGISTRATE OF FIRST CLASS, KARUNAGAPPALLY**
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**REVN. PETITIONER/ COMPLAINANT:**
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**STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.**

**BY PUBLIC PROSECUTOR SRI. C.K. SURESH**

**RESPONDENTS/ ACCUSED:**
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1. **K. SARANGADHARAN, PROPRIETOR, KRISHNA MEDICALS, KARUNAGAPPALLY RESIDING AT PANIKKANTTAYYATHU, KALLELIBHAGOM, KARUNAGAPPALLY.**

2. **M.C. CHERIYAN, OWNER, MAMOOTTIL DRUG HOUSE, KARITHA NORTH, CHETTIKULANGARA MAVELIKARA TALUK.**

3. **V.O. ANTONY, PROPRIETOR, GIL AYURVEDIC PRODUCTS, TRICHUR.**

**BY ADV. SRI.P.VIJAYA BHANU for R3.**
**SRI. S.R. MANOJ**
**SRI. R. RAJASEKHARAN PILLAI for R1 & R2.**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12/04/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

C.R.

**K. HEMA, J.**

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**CRL. R.P. NO. 968 OF 1999**

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**Dated this the 12th day of April, 2007.**

**O R D E R**

What are the bare relevant factors to be considered in a case where a food item is alleged to be 'misbranded' under Section 2(ix) of the Prevention of Food Adulteration Act ( 'PFA Act', for short) ? This short question arises in this revision.

2. The State is the revision petitioner. It challenges the order passed by the Magistrate's court under Section 245(2) of the Code of Criminal Procedure (Code, for short) discharging the respondents-accused of the offence under the PFA Act. A complaint was filed by Food Inspector against respondents alleging certain offences including "misbranding", under PFA Act and Prevention of Food Adulteration Rules (PFA Rules). According to complainant-Food Inspector, he purchased 600 grams of "arrow root mixture" (200 grams x 3 jars) which were kept and exposed for sale in the medical shop run by first respondent. The article purchased was sampled in accordance with provisions of the Act and Rules and a mahazar was also prepared. The sample was sent for analysis to the Public Analyst and on analysis, it was reported to be "Tapioca Flour". Hence, the complaint was filed for misbranding a food item which is an offence under Section 2(ix) of the

Act. At the time of sampling, first accused disclosed the name of local distributor and manufacturer and hence they were also proceeded against as accused nos. 2 and 3 respectively. It is further alleged in the complaint that first accused did not have licence under the PFA Rules and he is guilty of violation of the PFA Rules.

3. On appearance of the accused before trial court, the accused raised a preliminary objection that the complaint is not maintainable. According to the accused, 'arrow root mixture' is not a food item but it is intended for sale only as a medicinal item. Hence, it is contended that Food Inspector has no authority to take sample from first respondent's shop and initiate prosecution steps against the accused. This argument was accepted by the trial court and it was held that "arrow root" is only a component used for the manufacture of a medicinal item and necessary licence had been issued by Drugs Controller to the accused. It was also held that the details on the label of the container themselves show that the article is intended for gastric disorder in children and hence, it is not an article of "food", as defined under Section 2(v) of the Act, but it is only a medicinal item coming under Section 3 (b) coupled with Rule 154(1) of Drugs and Cosmetic Act ('Drugs Act', for short) and Rules.

4. Learned Magistrate further held that Drugs Inspector or Drugs Controller is the competent authority who can take up any prosecution steps, especially since a licence has been issued to third accused by Drugs Controller for the manufacture of 'arrow root mixture', as a medicinal item. The trial court, in such circumstances, held that the charge against the accused is groundless and that the complaint not maintainable. The accused were accordingly, discharged.

5. Heated arguments were raised in this revision that "arrow root mixture" is not a food item. While learned Public Prosecutor strenuously argued that "arrow root mixture" is food coming within the purview of the PFA Act and hence Food Inspector has the authority to take sample and deal with the matter in accordance with the provisions contained in the PFA Act and Rules , learned counsel for respondents-accused strongly argued that "arrow root mixture" is a drug and hence the violation, if any, can be dealt with only under the provisions of the Drugs Act. This court is thus, called upon to consider whether "arrow root mixture" is a drug coming under the Drugs Act or whether it is a food item, coming under the PFA Act.

6. On going through the nature of allegations made in the complaint, the various documents produced and other materials available on record, I find that the question whether "arrow root

mixture" is a drug or a food item is totally irrelevant in this case.

7. It is abundantly clear from the report of the Public Analyst that the article which is allegedly sold by the accused to the Food Inspector is wholly, "Tapioca Flour" and not "arrow root mixture". As per the allegations in the complaint, "Tapioca Flour" is the alleged food item which was sold by the accused, misbranding it as "Arrow Root Mixture". The prosecution case is that the accused committed the offence of "misbranding" of a food item, by making a false claim that it is "arrow root mixture". In such circumstances, it follows that even as per the prosecution case, "arrow root mixture" is only the fake name given to "Tapioca flour" as per the label on the container and a false claim is made by the accused that the article which is exposed for sale is "arrow root mixture". Therefore, it will be futile to consider whether "arrow root mixture" is a food or it is a drug because such an article was not even sold in this case. In such circumstances, the consideration of question whether "arrow root mixture" is a food or drug will as good as running after a shadow, without identifying the real object involved.

8. The trial court unnecessarily over-strained itself to resolve the issue whether "arrow root mixture" is a food or drug because "arrow root mixture" is only the false name given to another article

which was exposed for sale. According to me, the exercise was absolutely futile. Instead of chasing after an irrelevant issue, keeping track with the arguments advanced by both sides, the trial court ought to have identified the real issue and ascertained as to what are the relevant factors to be considered in a case of alleged "misbranding". The duty of the court is not to see which of the arguments is better, but it must identify the relevant factors which are to be determined for taking a decision in the case. The court has to find out whether the ingredients of the offence are established or not.

9. Section 2(ix) of the PFA Act deals with misbranding. It reads as follows:

> "**misbranded**" - an article of food shall be deemed to be misbranded -
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> "(a) if it is an imitation of, or is a substitute for, or resembles in a manner likely to deceive, another article of food under the name of which it is sold, and is not plainly and conspicuously labelled so as to indicate its true character;
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> (b) if it is likely stated to be the product of any place or country;
>
> (c) if it is sold by a name which belongs to another article of food;
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> (d) if it is so coloured, flavoured or coated, powdered or polished that the fact that the article is damaged is concealed or if the article is made to appear better or of greater value than it really is;

(e) if false claims are made for it upon the label or otherwise;

(f) if, when sold in packages which have been sealed or prepared by or at the instance of the manufacturer or producer and which bear his name and address, the contents of each package are not conspicuously and correctly stated on the outside thereof within the limits of variability prescribed under this Act;

(g) if the package containing it, or the label on the package bears any statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular; or if the package is otherwise deceptive with respect to its contents;

(h) if the package containing it or the label on the package bears the name of a fictitious individual or company as the manufacturer or producer of the article;

(i) if it purports to be, or is represented as being, for special dietary uses, unless its label bears such information as may be prescribed concerning its vitamin, mineral, or other dietary properties in order sufficiently to inform its purchaser as to its value for such uses;

(j) if it contains any artificial flavouring, artificial colouring or chemical preservative, without a declaratory label stating that fact, or in contravention of the requirements of this Act or rules made thereunder;

(k) if it is not labelled in accordance with the requirements of this Act or rules made thereunder".

10. Section 2(ix)(e) of the PFA Act provides that an article of food shall be deemed to be "misbranded", if false claims are made for it upon the label or otherwise. As per the allegations in the complaint and the documents produced, "Tapioca Flour" was labelled as "arrow root mixture" and thereby, a false claim was made upon the label that it contained the various other articles which are detailed on the label, including "arrow root powder". Thus, it appears that according to prosecution, the offence involved in this case falls under Section 2(ix)(e) of the PFA Act.

11. In a case involving alleged misbranding under section 2(ix)(e), the court has to firstly find out from the materials placed before it as to what is the article allegedly sold by the accused. The Public Analyst Report, the complaint and other documents produced are to be examined for this purpose. The nature of the article sampled from the accused can be identified mainly from the details in Public Analyst Report and not from the details on the label. In a case of misbranding coming under Section 2(ix)(e), the label will contain only the fake name and it will not reveal the exact nature of

the article available in the container. Hence, in view of the peculiar nature of the offence under Section 2(ix)(e), it will be futile to consider whether the article named on the container is a food article or not. The court shall ascertain from the allegations in the complaint, documents and particularly 'Public Analyst Report' as to what exactly was the article sold by the accused.

12. After having concluded the nature of the article sold, the court shall then decide, whether such article is “food” as defined under Section 2(v) of the PFA Act or not. If it is found to be 'food”, the court has to further examine whether the said food article is misbranded as laid down in Section 2(ix)(e) of the Act. So, in this case, learned Magistrate ought to have ascertained from the complaint, documents and the Public Analyst Report as to what exactly was the article allegedly sold to the Food Inspector. Thereafter, it must have decided whether such article is “food”, as defined under Section 2(v) of the PFA Act. If the court finds that the article sold is a food item, then the third question will be, whether such food item was misbranded, as laid down in Section 2(ix)(e) or any of the sub-clauses (a) to (k) of Section 2(ix) of the Act.

13. But, no attempt is seen made by trial court to enter any findings on any of the above facts. The trial court did not consider as

to what exactly is the article allegedly sold in this case. Instead, the court wrongly assumed that the article sold is "arrow root mixture", going by the false details on the container. The trial court, thereby, committed a serious error in law and on facts and unnecessarily groped after a vaccum.

14. Another mistake was also committed by the trial court. There is an allegation in the complaint that first accused sold an article of food in a medical shop, without exposing a valid PFA licence. Exposure for sale of a food article without a valid PFA licence, even if it be in a mediclal shop, according to prosecution is, yet another offence committed by first accused, in contravention of the relevant provisions under the PFA Act and Rules. But, learned Magistrate failed to consider this serious allegation levelled against the first accused, which may also constitute an offence. Without considering whether the said charge is groundless, the accused was discharged. Hence, on this score also, the trial court committed an illegality in ordering discharge under Section 245(2) of the Code.

Summing up, I find that the order under challenge is unsustainable and is liable to be set aside. The impugned order of discharge is therefore, set aside. The case is remanded to the trial court for fresh consideration and disposal in accordance with law, in

the light of the observations made in this order.

This revision petition is allowed.

**K. HEMA, JUDGE**

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